(1) (8)

Nos. 85-792 and 85-793

Supreme Court, U.S.
FILED
JUN 6 1986
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1985

INTERSTATE COMMERCE COMMISSION, PETITIONER

v.

BROTHERHOOD OF LOCOMOTIVE ENGINEERS, ET AL.

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY, PETITIONER

v.

BROTHERHOOD OF LOCOMOTIVE ENGINEERS, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE INTERSTATE COMMERCE COMMISSION AND THE UNITED STATES OF AMERICA

CHARLES FRIED
Solicitor General

LOUIS R. COHEN
Deputy Solicitor General

JEFFREY P. MINEAR
Assistant to the Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

ROBERT S. BURK
General Counsel

HENRI F. RUSH
Deputy General Counsel

SIDNEY L. STRICKLAND, JR.
Attorney
Interstate Commerce Commission
Washington, D.C. 20423
(202) 275-1851

56pp

QUESTION PRESENTED

Whether the Interstate Commerce Commission's approval of a transaction under the rail consolidation provisions of the Interstate Commerce Act, 49 U.S.C. (& Supp. II) 11341-11351, is sufficient to exempt a party to the transaction from provisions of the Railway Labor Act "as necessary to let that person carry out the transaction" (49 U.S.C. 11341(a)) without a specific Commission finding that the exemption is "necessary."

PARTIES TO THE PROCEEDINGS

The petitioner in No. 85-792 is the Interstate Commerce Commission and the petitioner in No. 85-793 is the Missouri-Kansas-Texas Railroad Company. The following were also parties in the court of appeals:

Denver & Rio Grande Western Railroad Company;
Union Pacific Railroad Company;
Missouri Pacific Railroad Company;
Brotherhood of Locomotive Engineers;
United Transportation Union; and
United States of America.

The Association of American Railroads and the National Railway Labor Conference participated as amici curiae in support of the petitions for rehearing and suggestions for rehearing en banc.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	2
Statutes involved	2
Statement	2
A. The statutory framework	4
B. The Union Pacific consolidation and the grant of trackage rights to MKT and DRGW	7
C. The present dispute	10
Summary of argument	18
Argument:	
The Interstate Commerce Commission's approval of a rail carrier transaction under Section 11344 of the Interstate Commerce Act, 49 U.S.C. 11344, by its own force, exempts the carriers from provisions of the Railway Labor Act that pose obstacles to the implementation of the approved transaction	22
A. The plain language of Section 11341(a) of the Interstate Commerce Act indicates that persons participating in an approved transaction are automatically exempt from other laws "as necessary to let that person carry out the transaction"	23
B. The Commission's interpretation of Section 11341(a) is consistent with the structure and objectives of the ICA's consolidation provisions	28
C. The Commission's interpretation of Section 11341(a) is consistent with six decades of agency and court interpretation of the statute	36
D. The court of appeals' construction would seriously impede the implementation of Commission-approved transactions	42
Conclusion	47

TABLE OF AUTHORITIES

Cases: Page

American Airlines, Inc. v. *CAB*, 445 F.2d 891, cert. denied, 404 U.S. 1015 40
Board of Governors v. *Dimension Financial Corp.*, No. 84-1274 (Jan. 22, 1986) 23
Brotherhood of Locomotive Engineers v. *Chicago & N.W. Ry.*, 314 F.2d 424, cert. denied, 375 U.S. 819 ..... 28, 38, 39, 40, 46
Brotherhood of Maintenance of Way Employees v. *United States*, 366 U.S. 169 39-40
Brotherhood of Railroad Trainmen v. *Jacksonville Terminal Co.*, 394 U.S. 369 6
Chevron U.S.A. Inc. v. *NRDC*, 467 U.S. 837 ..... 23, 42
Chicago, St. P., M. & O. Ry. Lease, 295 I.C.C. 696 .. 25, 37, 39, 43
City of Palestine v. *United States*, 559 F.2d 408, cert. denied, 435 U.S. 950 41
Control of Central Pacific by Southern Pacific, 76 I.C.C. 508 36
County of Marin v. *United States*, 356 U.S. 412 .... 29, 30
Denver & R. G. W. R.R. v. *United States*, 387 U.S. 485 33
Eagle-Picher Industries v. *EPA*, 759 F.2d 905 17
Elgin, J. & E. Ry. v. *Burley*, 325 U.S. 711 6
Greyhound Corp. v. *ICC*, 668 F.2d 1354 36
Illinois v. *ICC*, 713 F.2d 305 36
Kent v. *CAB*, 204 F.2d 263, cert. denied, 346 U.S. 826 ..... 28, 40
Maine Central R.R., Georgia Pacific Corp., Canadian Pacific, Ltd. & Springfield Terminal Ry. —Exemption from 49 U.S.C. 11342 & 11343, Finance Docket No. 30532 (I.C.C. Aug. 22, 1985), appeal pending, No. 85-1636 (D.C. Cir.) .. 37
McLean Trucking Co. v. *United States*, 321 U.S. 67 33
Minneapolis & St. L. Ry. v. *United States*, 361 U.S. 173 ..... 33, 34
Missouri Pacific R.R. v. *United Transportation Union*, 580 F. Supp. 1490, aff'd, 782 F.2d 107, petition for cert. pending, No. 85-1054 ..... 10, 11, 39

Cases—Continued: Page

National Bank of Davis v. *Office of the Comptroller of the Currency*, 725 F.2d 1390 23
Nemitz v. *Norfolk & W. Ry.*, 436 F.2d 841, aff'd, 404 U.S. 37 ..... 34, 39, 40, 46
New York Dock Ry.—Control—Brooklyn Eastern District Terminal, 360 I.C.C. 60, aff'd *sub nom. New York Dock Ry.* v. *United States*, 609 F.2d 83 ..... 5, 6, 40
Norfolk & W. Ry.—Trackage Rights—BN, 354 I.C.C. 605, as modified by *Mendocino Coast Ry. —Lease & Operate*, 360 I.C.C. 653, aff'd *sub nom. Railway Labor Executives' Ass'n* v. *United States*, 675 F.2d 1248 5
Penn-Central Merger Cases, 389 U.S. 486 36
Philbrook v. *Glodgett*, 421 U.S. 707 28
Railway Express Agency, Inc., Notes, 348 I.C.C. 157 37
Railway Labor Executives' Ass'n v. *ICC*, 675 F.2d 1248 40
Railway Labor Executives' Ass'n v. *United States*, 339 U.S. 142 40
Revised Regulations Governing Interlocking Officers, 336 I.C.C. 679 37
St. Joe Paper Co. v. *Atlantic Coast Line R.R.*, 347 U.S. 298 ..... 26, 29, 30
Schwabacher v. *United States*, 334 U.S. 182 ..... 29, 30, 35
Seaboard Air Line R.R. v. *United States*, 382 U.S. 154 33
Southern Pacific Transportation Co. v. *ICC*, 736 F.2d 708, cert. denied, No. 84-621 (Feb. 19, 1985) 9
Texas & N. O. R.R. v. *Brotherhood of Railroad Trainmen*, 307 F.2d 151, cert. denied, 371 U.S. 952 41
Texas Turnpike Authority Abandonment By St. Louis Southwestern Ry., 328 I.C.C. 42 37
Trailer Marine Transport Corp. v. *FMC*, 602 F.2d 379 27
Union Pacific Corp., Pacific Rail System, Inc. & Union Pacific R.R.—Control—Missouri Pacific Corp. & Missouri Pacific R.R., 366 I.C.C. 462 ..... 7, 8, 9, 41, 43

Cases—Continued: Page

United States v. *ICC*, 396 U.S. 491 ..... 23, 30, 33
United States v. *Riverside Bayview Homes, Inc.*, No. 84-701 (Dec. 4, 1985) 42
United States v. *Southern Pacific Co.*, 259 U.S. 214 36
Western Union Telegraph Co. v. *FCC*, 773 F.2d 375 22

Statutes and regulations:

Interstate Commerce Act, 49 U.S.C. (& Supp. II) 10101 *et seq.*:
49 U.S.C. 10101a(2) 46
49 U.S.C. 10327(i) 36
49 U.S.C. (& Supp. II) 11301 *et seq.* 4
49 U.S.C. (& Supp. II) 11341-11351 4
49 U.S.C. 11341 ..... 2, 19
49 U.S.C. 11341(a) ..... *passim*
49 U.S.C. 11343 2
49 U.S.C. 11343(a)(1) 4
49 U.S.C. 11343(a)(6) 4
49 U.S.C. (& Supp. II) 11344 ..... 2, 15, 19, 22, 24, 25
49 U.S.C. 11344(b) 4, 24
49 U.S.C. 11344(b)(1) 4
49 U.S.C. 11344(b)(1)(D) 4, 28, 34, 45
49 U.S.C. 11344(b)(1)(E) 4, 34
49 U.S.C. 11344(c) 4, 5, 19, 24, 31, 33
49 U.S.C. (Supp. II) 11347 ..... 2, 5, 6, 14, 21, 28, 34
49 U.S.C. 11351 36
Interstate Commerce Act of 1887, ch. 104, § 5, 24 Stat. 380 26
Railway Labor Act, 45 U.S.C. 151 *et seq.*:
45 U.S.C. 156 ..... 2, 3, 6
45 U.S.C. 157 ..... 2, 3, 6
Transportation Act of 1920, ch. 91, 41 Stat. 456 *et seq.* 26
§ 407, 41 Stat. 480 26
41 Stat. 480 (§ 5) 26, 27, 31, 33, 36
41 Stat. 482 (§ 5(66)(c)) 26
41 Stat. 482 (§ 5(8)) 26

Statutes and regulations—Continued: Page

Transportation Act of 1940, ch. 722, 54 Stat. 898 *et seq.* 26

§ 7, 54 Stat. 905 ..... 6, 27

54 Stat. 905 (§ 5) 26, 27, 31, 33, 36
54 Stat. 905 (§ 5(2)) 27, 38
54 Stat. 906-907 (§ 5(2)(f)) 6
54 Stat. 908 (§ 5(6)) 27
54 Stat. 908 (§ 5(8)) 27
54 Stat. 908-909 (§ 5(11)) 27, 34

Pub. L. No. 95-473, 92 Stat. 1337 *et seq.* 26

§ 3(a), 92 Stat. 1466 27

28 U.S.C. (& Supp. II) 2342 24
28 U.S.C. 2344 14
49 U.S.C. (1925-1926 ed.) 5(8) 35
49 U.S.C. (1940 ed.) 5(11) 35
49 C.F.R.:

Section 1115.4 36
Section 1117.1 35

Miscellaneous:

H.R. Rep. 650, 66th Cong., 2d Sess. (1920) 27
H.R. Rep. 95-1395, 95th Cong., 2d Sess. (1978) 26, 27
S. Rep. 1182, 76th Cong., 3d Sess. (1940):

Pt. 1 29
Pt. 2 29

In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-792

INTERSTATE COMMERCE COMMISSION, PETITIONER

v.

BROTHERHOOD OF LOCOMOTIVE ENGINEERS, ET AL.

No. 85-793

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY, PETITIONER

v.

BROTHERHOOD OF LOCOMOTIVE ENGINEERS, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE INTERSTATE COMMERCE COMMISSION AND THE UNITED STATES OF AMERICA

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-41a)[1] is reported at 761 F.2d 714. The opinions of

[1] "Pet. App." refers to the appendix to the petition for a writ of certiorari in No. 85-792.

the Interstate Commerce Commission (Pet. App. 51a-54a, 55a-68a) are unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 42a-43a) was entered on May 3, 1985. Petitions for rehearing were denied on August 9, 1985 (Pet. App. 48a-50a). The petitions for a writ of certiorari were filed on November 7, 1985 and granted on March 24, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). See 28 U.S.C. 2350(a).

STATUTES INVOLVED

Relevant provisions of the Interstate Commerce Act, 49 U.S.C. 11341, 11343; 49 U.S.C. (& Supp. II) 11344, 11347, and the Railway Labor Act, 45 U.S.C. 156 and 157, are set out at Pet. App. 69a-82a.

STATEMENT

The Interstate Commerce Commission has broad authority to examine, condition, and approve proposed rail carrier consolidations. In 1982, the Commission approved a major consolidation of the Union Pacific (UP), Missouri Pacific (MP), and Western Pacific (WP) railroad companies, requiring, among other conditions, that those railroads grant trackage rights to their competitors, the Missouri-Kansas-Texas Railroad Company (MKT) and the Denver & Rio Grande Western Railroad Company (DRGW), to ameliorate anti-competitive effects of the merger. This case presents a question arising from the trackage rights transactions.

MKT and DRGW each proposed, and the Commission approved, trackage rights agreements that reserved the rights of MKT and DRGW to conduct op-

erations using their own crews. Months after the Commission approved the consolidation and the trackage rights transactions, the Brotherhood of Locomotive Engineers (BLE) and the United Transportation Union (UTU)—respondent labor unions representing employees of MP—objected to the crewing plans. BLE and UTU contended that they had an established right, as representatives of MP's employees, to participate in crew assignment determinations when MP's tracks are used by other carriers, and that those rights could not be changed except in accordance with the Railway Labor Act (RLA), 45 U.S.C. 156, 157.

The Commission found no evidence that the unions had any established right to participate in determining crews of other railroads operating over MP's tracks. It also held that, in any event, its approval of the trackage rights transaction was dispositive: MKT's and DRGW's reservation of the right to crew their own trains was a clearly stated term of their trackage rights proposals and, under the relevant provision of the Interstate Commerce Act (ICA), 49 U.S.C. 11341(a), the Commission's approval automatically exempted the carriers participating in the trackage rights transactions from any conflicting requirements imposed by the RLA. The unions petitioned for judicial review, and a divided court of appeals vacated the Commission's decision. The majority ruled that Section 11341(a) does not automatically exempt carriers participating in approved transactions from inconsistent provisions of other laws and that the Commission "must explain why termination of the [Union's] asserted right to participate in crew selection is necessary to effectuate" the Commission-approved trackage rights transactions (Pet. App. 45a).

A. The Statutory Framework

Chapter 113 of the Interstate Commerce Act, 49 U.S.C. (& Supp. II) 11301 *et seq.*, vests the Interstate Commerce Commission with exclusive and plenary jurisdiction to examine, condition, and approve rail carrier combinations, including the consolidation of two or more carriers (49 U.S.C. 11343(a)(1)) and the acquisition of trackage rights by one carrier over the lines of another (49 U.S.C. 11343(a)(6)). The statutory provisions grant the Commission broad authority to evaluate the effects of these transactions on interested persons and the public. See 49 U.S.C. (& Supp. II) 11341-11351.

Section 11344(c) provides that upon application of the parties, the Commission may conduct a proceeding and "shall approve and authorize a transaction under this section when it finds that the transaction is consistent with the public interest." 49 U.S.C. 11344(c). That section identifies specific criteria, including "the interests of carrier employees affected by the proposed transaction" (49 U.S.C. 11344(b)(1)(D)) and "whether the proposed transaction would have an adverse effect on competition" (49 U.S.C. 11344(b)(1)(E)), to guide the Commission's consideration. 49 U.S.C. 11344(b).[2] Section 11344(c) also provides

---

[2] Section 11344(b) instructs that in situations, as here, involving the merger or control of at least two Class I railroads, the Commission shall consider "at least" the following factors (49 U.S.C. 11344(b)(1)):

> (A) the effect of the proposed transaction on the adequacy of transportation to the public;
>
> (B) the effect on the public interest of including, or failing to include, other rail carriers in the area involved in the proposed transactions;

that the Commission "may impose conditions governing the transaction." 49 U.S.C. 11344(c).

Section 11347 provides that the Commission shall impose conditions to protect the interests of railroad employees who are adversely affected by an approved transaction. 49 U.S.C. (Supp. II) 11347. The Commission has formulated standard labor protective conditions that govern consolidations (New York Dock conditions) and the grant of trackage rights (Norfolk & Western conditions).[3] These conditions ensure that

---

(C) the total fixed charges that result from the proposed transaction;

(D) the interest of carrier employees affected by the proposed transaction; and

(E) whether the proposed transaction would have an adverse effect on competition among rail carriers in the affected region.

[3] See *New York Dock Ry.—Control—Brooklyn Eastern District Terminal*, 360 I.C.C. 60, aff'd *sub nom. New York Dock Ry.* v. *United States*, 609 F.2d 83 (2d Cir. 1979); *Norfolk & W. Ry.—Trackage Rights—BN*, 354 I.C.C. 605 (1978), as modified by *Mendocino Coast Ry.—Lease & Operate*, 360 I.C.C. 653, 664 (1980), aff'd *sub nom. Railway Labor Executives' Ass'n* v. *United States*, 675 F.2d 1248 (D.C. Cir. 1982). These conditions generally provide that an employee who is dismissed from his job or placed in a lower paying position as a result of the approved transaction will continue, for a period of years, to receive the equivalent of the wages he received prior to displacement. The employee must accept available work and will receive moving expenses if relocation is necessary. Work transfers are effected through negotiations between the carrier and the union, which, in turn, are subject to binding arbitration.

The railroad industry's use of labor protective provisions originated in the Washington Job Protection Agreement of

transactions found to be in the public interest can be consummated without labor strife by providing a "fair arrangement" (49 U.S.C. (Supp. II) 11347) for displaced employees.[4]

When the Commission has approved a transaction, the statute exempts the participants from any federal, state, or local law that would interfere with their carrying out the transaction or conducting business pursuant to it. Section 11341(a) provides (49 U.S.C. 11341(a)):

> A carrier, corporation, or person participating in that approved or exempted transaction is exempt from the antitrust laws and from all other law, including State and municipal law, as necessary to let that person carry out the transaction, hold,

---

1936, a voluntary agreement between industry and labor. Congress later amended former Section 5(2)(f) of the ICA to provide that the ICC must impose labor protective conditions when approving rail consolidations. See Transportation Act of 1940, ch. 722, § 7, 54 Stat. 905. The statutory provisions have since been amended and recodified in their present form. See 49 U.S.C. (Supp. II) 11347. The rather complicated history of labor protective provisions is recounted in *New York Dock Ry.* v. *United States*, 609 F.2d at 86-90.

[4] The conditions devised by the Commission under Section 11347 for application to approved transactions stand in sharp contrast to the RLA's much more cumbersome work change procedures. Under the RLA, an attempt to change collective bargaining agreements results in a "major dispute." *Elgin, J. & E. Ry.* v. *Burley*, 325 U.S. 711, 723 (1945). The parties to the dispute must engage in a protracted procedure to resolve their differences, which includes negotiation, mediation, voluntary arbitration, and conciliation. See 45 U.S.C. 156, 157. If the parties are unable to reach an agreement, either party may resort to economic self-help such as a lock-out or strike. See generally *Brotherhood of Railroad Trainmen* v. *Jacksonville Terminal Co.*, 394 U.S. 369, 378-380 (1969).

maintain, and operate property, and exercise control or franchises acquired through the transaction.

This provision exempts a Commission-approved consolidation or grant of trackage rights from legal obstacles that would otherwise bar or impede its implementation.

B. The Union Pacific Consolidation and the Grant of Trackage Rights to MKT and DRGW

The present dispute arises out of the Commission's approval of the consolidation of the Union Pacific, Missouri Pacific, and Western Pacific railroad companies, subject to various competition and labor protective conditions. *Union Pacific Corp., Pacific Rail System, Inc. & Union Pacific R.R.—Control—Missouri Pacific Corp. & Missouri Pacific R.R.* (*UP-Control-MP*), 366 I.C.C. 462 (1982). MKT and DRGW proposed, and the Commission approved, trackage rights agreements that would permit those railroads to conduct operations over MP tracks. As the record in the Commission proceeding demonstrates, the participants—including BLE and UTU—fully understood that MKT and DRGW had reserved the right to use their own crews for operation of their trains over MP lines.

Union Pacific Corporation filed its application for Commission approval of the consolidation on September 15, 1980. *UP-Control-MP*, 366 I.C.C. at 471 (Finance Docket No. 30,000). A number of railroads (including MKT and DRGW), labor unions (including BLE and UTU), and other entities objected and sought Commission-imposed conditions (*id.* at 562-625). MKT claimed that the merger would have serious anticompetitive effects and proposed that it be

given the right to run its trains on MP tracks to preserve its competitive capabilities (*id.* at 566). DRGW made a similar claim and also proposed that it have the right to use MP lines (*id.* at 572). The MKT and DRGW proposals each specifically stated that the tenant railroad would have the right to supply its own crews when operating trains on MP tracks.[5] BLE and UTU requested labor protective conditions for both the UP-MP-WP primary transaction and the MKT and DRGW trackage rights requests. However, the unions did not oppose the MKT and DRGW proposals as to crewing. See Pet. App. 61a-65a.

The Commission held hearings on the proposed consolidation from March 1981 to January 1982. MKT and DRGW witnesses explained the basis for their trackage rights proposals (see Pet. App. 63a-64a). Neither BLE nor UTU challenged the MKT and DRGW proposals to use their own crews to conduct trackage rights operations (*ibid.*), and neither union suggested that it would be entitled to a voice in the MKT and DRGW crew selections (*id.* at 64a-

---

[5] MKT's proposed trackage rights agreement, filed in January 1981, stated that "MKT, with its own employees, and at its sole cost and expense, shall operate its engines, cars and trains on and along Joint Track." Proposed Trackage Rights Agreement § 5, Finance Docket No. 30,000 (Sub.-No. 25). See Pet. App. 62a. DRGW's proposed trackage rights agreement, also filed in January, 1981, stated that "Rio Grande may, at its option, elect to employ its own crews for the movement of its trains, locomotives and cars to points on or over the Joint Track." Proposed Trackage Rights Agreement § 6(c)(3), Finance Docket No. 30,000 (Sub.-No. 18). See Pet. App. 62a. On February 20, 1981, MKT and DRGW filed verified statements supporting their trackage rights applications that further indicated their intentions to use their own crews (*id.* at 62a-63a).

65a). Following the hearings, the parties submitted briefs stating their positions. Again, neither BLE nor UTU challenged the proposal of MKT and DRGW to use their own crews when operating their trains over MP tracks (*id.* at 65a).

On October 20, 1982, the Commission served its order approving the UP-MP-WP consolidation and partially approving the MKT and DRGW trackage rights proposals, both subject to various conditions. *UP-Control-MP*, 366 I.C.C. at 653-655. The Commission approved MKT's "north-end" trackage rights proposal, authorizing MKT to use MP tracks in Iowa, Kansas, Missouri, and Nebraska, but denied approval of MKT's "St. Louis" trackage rights proposal, involving trackage in Missouri, and its "south-end" proposal, involving MP trackage in Texas. 366 I.C.C. at 566-572. The Commission approved DRGW's proposal for trackage rights over MP tracks between Pueblo, Colorado and Kansas City, Missouri. 366 I.C.C. at 572-578. Approval of the consolidation was conditioned on the grant of the trackage rights by the consolidating carriers. The Commission imposed standard labor protective conditions (see note 3, *supra*) on the consolidation transaction and the trackage rights transactions. 366 I.C.C. at 618-622.

Numerous parties sought judicial review of the Commission decision; however, neither BLE nor UTU challenged the MKT and DRGW trackage rights transactions or the terms of those transactions giving MKT and DRGW the right to use their own crews. The Commission's decision was affirmed in all relevant respects. *Southern Pacific Transportation Co.* v. *ICC*, 736 F.2d 708 (D.C. Cir. 1984), cert. denied, No. 84-621 (Feb. 19, 1985).

C. The Present Dispute

The UP-MP-WP consolidation was consummated on December 22, 1982. See *Missouri Pacific R.R.* v. *United Transportation Union*, 580 F. Supp. 1490, 1495 (E.D. Mo. 1984), aff'd, 782 F.2d 107 (8th Cir. 1986). See 85-792 Pet. Add. 6a.[6] On December 31, 1982, MP informed its employees' representatives that MKT would soon begin trackage rights operations on MP lines and that " '[n]o Missouri Pacific employees will be adversely affected as a result of the utilization of these trackage rights * * *' " (*ibid.*). UTU objected to the MKT operations by a letter dated January 4, 1983, stating that " 'it is our position that any and all service operated northward on Missouri Pacific tracks out of Kansas City, Missouri be protected by Missouri Pacific (Proper) road crews' " (*ibid.*). Meanwhile, MKT, consistent with its trackage rights proposal, entered into crewing agreements with its employees. Shortly thereafter, MKT commenced operations over MP tracks using its own crews (*ibid.*).[7]

On March 28, 1983, UTU officials accused MP of permitting a " 'trespass on [their] collectively bar-

---

[6] Because the *Missouri Pacific* decision is closely related to the present dispute, the Commission reproduced it in full as an addendum to its petition (85-792 Pet. Add. 1a-39a). UTU petitioned for a writ of certiorari before judgment while that case was pending before the Eighth Circuit. See *United Transportation Union* v. *Missouri Pacific R.R.*, No. 85-1054, noting its close relationship to the present case (85-1054 Pet. at 2-3). The Eighth Circuit later affirmed the decision. 782 F.2d 107 (1986).

[7] DRGW, consistent with its proposal, decided to use MP employees temporarily in exercising its trackage rights (Pet. App. 8a).

gained agreements * * * by non-Missouri Pacific employees'" (85-792 Pet. Add. 7a). UTU stated that it would initiate a strike against MP if MKT crews continued to conduct operations over MP track without UTU consent. On March 30, 1983, MP sought and received a temporary restraining order—and, later, an injunction—prohibiting UTU's threatened strike (*id.* at 7a-8a, 32a).[8]

Meanwhile, on April 4, 1983, BLE filed a "Petition for Clarification" requesting the Commission to clarify "its intent as to the crew manning or assignments of the trains to be operated by [MKT and DRGW]" under the Commission approved trackage rights (C.A. App. 2). The petition stated that "[i]t is * * * necessary that the Commission clarify the intent of its order and inform the parties as to the method available to resolve any dispute as to crew manning and the extent to which [DRGW] and MKT may use their crews to operate trains over the lines of [MP]" (*id.* at 5). On May 12, 1983, the Commission denied the petition, finding no need for clarification (Pet. App. 51a-54a). The Commission stated that "[i]nasmuch as DRGW and MKT proposed in their applications that the operations would

---

[8] The district court concluded that the Commission's approval of the trackage rights transactions exempted MP from "any requirement of the RLA" to negotiate over crew selection (85-792 Pet. Add. 23a). The court emphasized (*id.* at 28a):

> [A]llowing UTU to strike would be tantamount to saying that UTU has carte blanche authority to frustrate and avoid a material term of a consolidation approved by the ICC. Congress did not intend that affected employees have such power to block consolidations which are in the public interest.

The decision was affirmed on appeal. 782 F.2d 107 (8th Cir. 1986).

be performed with their own crews, our approval of the applications authorizes such operations" (*id.* at 54a). The Commission also noted that it had "unambiguously specified that trackage rights tenants may perform operations using their own crews" in other recently issued decisions dealing with DRGW's trackage rights. *Ibid.* (footnote omitted); see Pet. App. 8a-9a.

On May 31, 1983, BLE and UTU each filed a "Petition for Reconsideration" of the Commission's May 12, 1983 decision (C.A. App. 47-55, 71-84). The unions claimed that their established relationship with MP as representatives of its employees gave them a right to participate in decisions with respect to crewing of trains operated over MP tracks even if operated by another carrier. They argued that crew assignment disputes must be settled under the RLA and that even if Commission approval of a rail consolidation could exempt the railroads from RLA requirements, the Commission failed to make findings necessary to support the exemption. They made the further argument that the tenant railroads' use of their own crews would violate the requirement of Section 11347 of the ICA that labor receive certain protection in connection with approved consolidation transactions. See Pet. App. 57a.[9]

---

[9] Neither union identified the precise source of their purported right to control the crewing of all trains exercising trackage rights over MP tracks. BLE simply stated, without further explanation, that "[t]he collective bargaining agreements in effect and the existing objective working conditions guarantee that all work performed on the lines of the Union Pacific and the Missouri Pacific be performed by their employees" (C.A. App. 53). UTU claimed, without elaboration, that "th[e] Commission has authorized MKT and DRGW to perform acts which are contrary to the Railway Labor Act—

The Commission denied the petitions for reconsideration (Pet. App. 55a-68a). The Commission rejected at the outset the union's contention that "UP-MP employees, through their bargaining agents, have the right to participate in the trackage rights crew selection process," finding the unions' argument that they had any such underlying rights "unpersuasive and unsupported by the record" (*id.* at 58a-59a, 65a). The Commission stated that "the trackage rights agreements do not involve a change in UP-MP employees' working conditions in a manner contrary to RLA requirements" (*id.* at 59a). The Commission then said that, in any event, Commission approval "exempts such a transaction from the requirements of all laws as necessary to permit the transaction to be carried out, and includes an exemption from the requirements of the RLA" (*ibid.*). The Commission also rejected the contention that its approval of a transaction exempts a railroad from the requirements of the RLA only if it first makes special findings of necessity, explaining (*id.* at 67a):

> Trackage rights agreements are considered under the criteria of 49 U.S.C. 11344 and if those criteria are met, the agreement is approved. The approval confers self-executing immunity on all material terms of the agreement from all other

---

i.e., that Act's prohibition on unilateral change on [*sic*] working conditions—and to the employee protective provisions imposed in this case" (C.A. App. 77). It should be noted that any MP employee represented by BLE or UTU who might be displaced by MKT's or DRGW's exercise of trackage rights was already eligible for compensation in accordance with the Commission-imposed labor protective provisions. See note 3, *supra*. The unions claimed the *additional* right, on behalf of MP employees, to participate in the crew selection for MKT and DRGW trains. See Pet. App. 8a.

law to the extent necessary to permit implementation of the agreement.

The Commission observed that the MKT/DRGW crewing provisions, which the railroads specifically set forth when applying for trackage rights (see *id.* at 62a-65a), "are material terms of the agreement and may be implemented without any other approval" (*id.* at 67a). The Commission also explained that Section 11347 of the ICA protects labor through the imposition of labor protective conditions providing compensation to displaced employees. It does not prevent railroads from implementing changes in working conditions that are contemplated by the authorized transaction (Pet. App. 60a).

BLE and UTU sought judicial review, contending, first, that the Commission failed to make findings necessary to support the Section 11341(a) exemption from the RLA requirements and, second, that the ICA's labor protective provisions preserve the unions' purported rights to participate in MKT's and DRGW's crewing assignments. A divided court of appeals vacated the May 1983 and October 1983 decisions and remanded the case to the Commission (Pet. App. 1a-45a).

The court first addressed the timeliness of the unions' petitions for judicial review. It recognized (Pet. App. 11a-12a) that the unions were, in effect, challenging aspects of the Commission's original approval decision, served on October 20, 1982, and that the 60-day period for judicial review of that decision had long since passed. See 28 U.S.C. 2344. The court nevertheless held that the unions' challenges were timely, finding that the unions had inadequate notice that the Commission's approval of the MKT and

DRGW trackage rights proposals would permit those railroads to select their own crews (Pet. App. 12a-14a).[10]

The court then turned to the merits of the unions' claims. It concluded that the Commission's failure to make specific findings of necessity for exemption of the crewing arrangement from any conflicting requirements of the RLA was "decisive" (Pet. App. 15a).[11] The court reasoned that the Commission had misinterpreted the provision of Section 11341(a) exempting any person participating in an approved transaction from "the antitrust laws and from all other law * * * as necessary to let that person carry out the transaction." 49 U.S.C. 11341(a). The court specifically rejected the Commission's position that, upon Commission approval of the transaction pursuant to the public interest criteria set forth in 49 U.S.C. (& Supp. II) 11344, Section 11341(a) automatically exempts the participants from any legal obstacle to implementation of a material term of the transaction (Pet. App. 16a-20a).

---

[10] The court stated (Pet. App. 12a (emphasis in original)):

> The Commission and the railroads argue that the trackage applications specifically noted that D&RGW *might*, and MKT *would*, use their own crews and thus there was no ripeness problem. However, those applications were bounded by ICC's general pronouncement that the labor protection conditions would not be violated. As soon as it became apparent that MKT intended to use its own crews, the unions petitioned ICC for clarification of the application of the labor protection conditions.

[11] The court therefore did not address the second question, whether the ICA's labor protective provisions preserve the unions' purported rights to participate in determining MKT's and DRGW's crewing assignments (Pet. App. 20a-21a).

The court stated that "Congress has given [the Commission] broad powers to immunize transactions from later legal obstacles, but this delegation by Congress is explicitly qualified by a necessity component" (Pet. App. 16a). The court ruled that the Commission must, in addition to approving the terms proposed by the applicants, make an express finding that an exemption is essential to the success of the transaction, stating (*id.* at 16a n.4):

> [The Commission's] decision-making process, either in the approval or in a later proceeding, must reveal evidence supporting a conclusion that waiver of a particular legal obstacle is necessary to effectuate the transaction.

The court found that the Commission's "analysis of the necessity for waiving the Railway Labor Act * * * is virtually nonexistent, both in the 1982 decision and in the 1983 decisions" (*id.* at 19a), adding that "the Commission did not give a shred of reasoning to support its view that completion of the transactions required shielding crew selection from the Railway Labor Act" (*ibid.* (footnote omitted)).

The court, vacating the Commission's decisions, stated in its amended order (Pet. App. 45a):

> On remand, to exercise its exemption authority, the Commission must explain why termination of the asserted right to participate in crew selection is necessary to effectuate the procompetitive purpose of the grant of trackage rights or some other purpose sufficiently related to the transaction.

The court also stated that "[u]ntil such a finding of necessity is made, the provisions of the Railway Labor

Act and the Interstate Commerce Act remain in force" (*ibid.*).[12]

Judge MacKinnon dissented (Pet. App. 22a-39a). He disagreed, first, with the court's determination that the unions' appeals were timely (*id.* at 22a-28a).[13] Turning to the merits, he first criticized the court's failure to examine whether the unions had underlying rights to participate in MKT's and DRGW's crew selection decisions.[14] He then rejected the majority's conclusion that the railroads' right to a Section 11341(a) exemption from the Railway Labor Act depends upon an express Commission finding that the exemption is "necessary."

Judge MacKinnon stated that "[t]he whole basis for granting the trackage rights, which included the

---

[12] The court, in its initial opinion, had simply vacated the Commission decisions and left "the parties to their Railway Labor Act remedies" (Pet. App. 21a). That opinion "intimate[d] no view on the merits of the unions' claims about their underlying right to a role in crew selection" (*ibid.*).

[13] He observed, in particular, that "[t]he unions had been on notice since the day the applications for trackage rights were filed on January 13, 1981, that the railroads intended to use their own crews to operate their own trains if their applications for trackage rights were approved" (Pet. App. 26a). He also observed that, "'[a]s a general proposition, * * * if there is *any* doubt about the ripeness of a claim, petitioners must bring their challenge in a timely fashion or risk being barred.'" *Id.* at 27a (quoting *Eagle-Picher Industries* v. *EPA*, 759 F.2d 905, 914 (D.C. Cir. 1985) (emphasis in original)).

[14] He observed that the Commission "found that 'the record contains no evidence to support the contention of UTU and BLE that UP-MP employees have rights under collective bargaining agreements to participate in the crew selection process' of foreign railroads operating under trackage rights" (Pet. App. 29a-30a).

crew selection provisions, was the implicit conclusion that the granting of such rights was *necessary* to the approval of the merger" (Pet. App. 28a (emphasis in original)). He noted that this Court has repeatedly recognized the Commission's broad power to approve rail mergers that are consistent with the public interest and has treated the Section 11341(a) exemption as an attendant consequence of approval (Pet. App. 33a-38a). Finally, he observed that "the Commission's goal of preservation of competition through the grant of trackage rights might well be frustrated by the prospect of requiring the railroads granted those rights to negotiate with the union representing the employees of its *competitors*" (*id.* at 39a (emphasis in original)).

SUMMARY OF ARGUMENT

The Interstate Commerce Act gives the Interstate Commerce Commission broad authority to approve proposed railroad consolidations and trackage rights transactions that the Commission finds, after appropriate proceedings, to be consistent with the public interest. When such a transaction has been approved, the ICA itself exempts each participating carrier from all laws "as necessary to let that person carry out the transaction." 49 U.S.C. 11341(a).

The court of appeals misconstrued Section 11341 (a). Instead of treating the exemption from other laws as an automatic consequence of Commission approval, the court ruled that the Commission must make an express affirmative determination with respect to each transaction term that faces a legal obstacle. It said "[The Commission's] decision-making process, either in the approval or in a later proceeding, must reveal evidence supporting a conclu-

sion that waiver of a particular legal obstacle is necessary to effectuate the transaction" (Pet. App. 16a n.4). This construction of Section 11341(a) is inconsistent with the plain language of Section 11341, with the structure and purposes of the ICA's rail carrier consolidation provisions, and with Commission and court precedents. It would seriously impede the consummation of Commission approved rail consolidations plans.

A. The starting point for interpreting a statute is, of course, the statute itself. In this case, the statutory language is straightforward and unambiguous. Section 11344(c) provides that "[t]he Commission shall approve and authorize a transaction under this section when it finds the transaction is consistent with the public interest." 49 U.S.C. 11344(c). Section 11341(a) provides that "[a] carrier, corporation, or person participating in [an] approved * * * transaction is exempt from the antitrust laws and from all other law, including State and municipal law, as necessary to let that person carry out the transaction * * *." 49 U.S.C. 11341(a).

Under the statute, the Commission must determine whether a proposed consolidation is consistent with the public interest. The Commission is directed to consider specified factors, including impacts on employees and on competition. Interested persons, including labor representatives, have a right to challenge a proposal in whole or in part, and the Commission's determination is, of course, subject to judicial review. But once the proposed transaction is approved, Section 11341(a) confers an exemption of sufficient breadth to enable the parties to implement the transaction and conduct business in accordance with it. The court of appeals misspoke when it said

that "Congress has given [the Commission] broad powers to immunize transactions from later legal obstacles" (Pet. App. 16a). Congress gave the Commission authority to examine, condition, and approve transactions. The "immunization" is a statutory consequence of Commission approval.

B. The ICA's consolidation provisions have two relevant purposes: first, to leave to the carriers themselves the task of formulating and proposing transactions; and second, to expedite those transactions that are in the public interest by replacing the myriad of federal, state, and local laws otherwise affecting such transactions with a single proceeding in which the Commission approves, disapproves, or conditions the rail carriers' proposal in accordance with congressionally prescribed public interest criteria.

The court of appeals' decision defeats these purposes. It would require the Commission to determine which of the terms of a complex transaction are "necessary to effectuate" (Pet. App. 45a) the transaction, a matter that the ICA leaves largely to the business judgment of the carriers. More importantly, by requiring the Commission either to anticipate every conflict with federal, state, or local law or to pass post hoc judgments on the "necessity" of transaction terms when conflicts with other laws later appear, the court's approach would defeat the congressional goal of replacing the various federal, state, and local laws with a single approval proceeding that provides a comprehensive consideration of the public interest.

C. The decision below represents a marked departure from agency and judicial precedent. The Commission has consistently recognized that "[t]he terms of section 11341 immunizing an approved transaction from any other laws are self-executing and there is

no need for us expressly to order or to declare that a carrier is specifically relieved from certain restraints" (see Pet. App. 60a). The courts of appeals have agreed with that interpretation.

D. This case demonstrates how the court of appeals' construction of Section 11341(a) would seriously impede the express congressional policy of expediting rail consolidations that are consistent with the public interest. The Commission here approved the carriers' consolidation proposal and the trackage rights transactions after extensive review involving hundreds of witnesses and thousands of pages of testimony. MKT and DRGW expressly proposed the crew selection provisions at issue. The unions raised no objection to those provisions at that time and the Commission approved them as elements of the consolidation plan. By allowing the unions to demand a post-approval Commission "necessity" proceeding, the court has ensnared the implementation of a trackage rights transaction—which the Commission not only approved but insisted upon as a condition to its approval of the UP-MP-WP consolidation—in a tangle of legal challenges.[15]

---

[15] The court of appeals did not reach the unions' claim that Section 11347 of the ICA requires the Commission to preserve their allegedly established right to crew trains operated over MP's tracks even when operated by other carriers (Pet. App. 20a-21a). There is no reason to remand this case to the court of appeals to resolve that issue. As previously noted, the Commission found no evidence to support the unions' claim that they had an established right to participate in the assignment of crews to non-MP trains that operate over MP tracks (*id.* at 58a-59a, 65a). The court of appeals did not disturb that finding. Accordingly, there is no occasion to remand this case for a determination of how the ICA's labor protective provisions would apply if those rights existed.

ARGUMENT

THE INTERSTATE COMMERCE COMMISSION'S APPROVAL OF A RAIL CARRIER TRANSACTION UNDER SECTION 11344 OF THE INTERSTATE COMMERCE ACT, 49 U.S.C. 11344, BY ITS OWN FORCE, EXEMPTS THE CARRIERS FROM PROVISIONS OF THE RAILWAY LABOR ACT THAT POSE OBSTACLES TO THE IMPLEMENTATION OF THE APPROVED TRANSACTION

The court of appeals erred in holding that the Commission's approval of a proposed transaction under Section 11344 of the ICA is insufficient to exempt a participant from the requirements of other laws—in this case the RLA—unless the Commission makes a specific finding that the exemption is necessary and explains its reasoning to the satisfaction of the reviewing court. That ruling is inconsistent with the plain language of Section 11341(a), the structure and purposes of the ICA's rail consolidation provisions, and longstanding precedent. It will seriously impede the implementation of Commission-approved transactions.[16]

---

[16] We note two preliminary matters that merit brief discussion. First, as Judge MacKinnon observed (Pet. App. 22a-28a), there is reason to question the timeliness of the unions' petition to the court of appeals for judicial review. We submit that the unions' petitions were timely for the purpose of reviewing the Commission's denial of BLE's petition for clarification, but the scope of the court's review should have been limited to whether the Commission abused its discretion in concluding that the October 20, 1982 consolidation decision "does not require clarification" (Pet. App. 53a). See *Western Union Telegraph Co.* v. *FCC*, 773 F.2d 375, 380-381 (D.C. Cir. 1985). The unions should not have been permitted to use a petition for clarification (or a subsequent motion to reconsider the denial of that petition) as a wedge for reopening the

A. The plain language of Section 11341(a) of the Interstate Commerce Act indicates that persons participating in an approved transaction are automatically exempt from other laws "as necessary to let that person carry out the transaction"

The starting point for interpreting a statute is, of course, the language itself. "If the statute is clear and unambiguous 'that is the end of the matter, for the court as well as the agency, must give effect to the unambiguously expressed intent of Congress.'" *Board of Governors* v. *Dimension Financial Corp.*, No. 84-1274 (Jan. 22, 1986), slip op. 6 (quoting *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837, 842-843 (1984)).

Commission's final consolidation decision. See *National Bank of Davis* v. *Office of the Comptroller of the Currency*, 725 F.2d 1390 (D.C. Cir. 1984). Thus, the court of appeals had jurisdiction in this case; its first error lay in impermissibly expanding the scope of its review. See *United States* v. *ICC*, 396 U.S. 491, 521 (1970).

Second, the court of appeals' willingness to indulge the unions' unsupported claims that they had an established right to participate in MKT's and DRGW's crewing decisions is, as Judge MacKinnon stated, "inexplicable" (Pet. App. 29a). The Commission specifically found that "the record contains no evidence to support the contention of UTU and BLE that UP-MP employees have rights under collective bargaining agreements to participate in the trackage rights crew selection process" (*id.* at 65a). As Judge MacKinnon explained (*id.* at 29a-30a), the court plainly erred in addressing Section 11341(a)'s impact on the unions' purported rights on the presumption, based on the union's contrary contentions, that these rights existed.

Both of these errors rest, in principal part, on the court's mistaken understanding of "the interpretation to be given various Commission actions" (Pet. App. 11a; see *id.* at 20a-21a). We thus direct our arguments to the court's central mistake, its misunderstanding of the Commission's role in the Section 11341(a) exemption process.

In this instance, Congress has unambiguously stated that the Commission's approval of a rail consolidation or trackage rights transaction under the prescribed "public interest" standard automatically exempts transaction participants from federal, state, and local laws that would prevent implementation of the transaction's terms.

The statutory language is both clear and straightforward. Section 11344(c) provides that "[t]he Commission shall approve and authorize a transaction under this section when it finds the transaction is consistent with the public interest." 49 U.S.C. 11344(c). Section 11341(a) then provides (49 U.S.C. 11341 (a)):

> A carrier, corporation, or person participating in that approved or exempted transaction is exempt from the antitrust laws and from all other law, including State and municipal law, as necessary to let that person carry out the transaction, hold, maintain, and operate property, and exercise control or franchises acquired through the transaction.

As the statutory language indicates, the Commission must determine whether a proposed consolidation is consistent with the public interest. That determination is made on the record, after hearing the views of interested persons. See 49 U.S.C. (& Supp. II) 11344. It is guided by specific statutory criteria (49 U.S.C. 11344(b)) and is, of course, subject to judicial review (28 U.S.C. (& Supp. II) 2342). But once the proposed transaction is approved, Section 11341(a) automatically confers an exemption of sufficient breadth to permit implementation of the authorized transaction.

The court of appeals' conclusion that "Congress has given [the Commission] broad powers to immunize

transactions from later legal obstacles" (Pet. App. 16a) is inaccurate. Section 11344 gives the Commission authority to consider, condition, and approve transactions proposed by carriers. The Section 11341 (a) exemption is a congressionally prescribed consequence of Commission approval that extends as far "as necessary to let that person carry out the transaction." 49 U.S.C. 11341(a). The court of appeals' conclusion that the Commission must make supplemental findings, either in the approval proceeding or in later proceedings, that the exemption from a particular law is "necessary to effectuate" the terms of an approved transaction is also inconsistent with the plain language of the statute. Section 11341(a) says that a participant in an approved transaction "is exempt." The section makes no reference to any contemporaneous or post hoc Commission examination of each potential legal obstacle to determine whether it must be removed. The scope of the exemption is defind by the terms of the approved transaction.[17]

The language of the present Section 11341(a) and Section 11344 is consistent in this respect with statutory language that goes back more than 60 years. Congress enacted the relevant provisions of both sections as part of its recodification, without substantive

---

[17] The Section 11341(a) exemption applies, of course, only to terms comprehended by the Commission's approval order. See, *e.g.*, *Chicago, St. P., M. & O. Ry. Lease*, 295 I.C.C. 696, 697, 702 (1958). There may be occasions where it is necessary for the Commission to clarify, in a post-approval proceeding, the scope or meaning of the proposal it has approved. See note 23, *infra*. This, however, is not such an occasion: crewing arrangements are plainly central to trackage rights transactions, and MKT's and DRGW's proposals on this score could hardly have been more clearly stated. See pages 43-46, *infra*.

change, of former Section 5 of the ICA. See Pub. L. No. 95-473, 92 Stat. 1337 *et seq.*; H.R. Rep. 95-1395, 95th Cong., 2d Sess. 158-168 (1978). The recodified provisions find their origins in the Transportation Act of 1920, ch. 91, 41 Stat. 456 *et seq.*, and the Transportation Act of 1940, ch. 722, 54 Stat. 898 *et seq.* See generally *St. Joe Paper Co.* v. *Atlantic Coast Line R.R.*, 347 U.S. 298, 315-321 (1954) (appendix to opinion of the Court).

Section 407 of the Transportation Act of 1920, ch. 91, 41 Stat. 480, amended Section 5 of the Interstate Commerce Act of 1887, ch. 104, 24 Stat. 380 specifically to encourage railroad consolidation. See *St. Joe Paper Co.* v. *Atlantic Coast Line R.R.*, 347 U.S. at 315-316. In particular, it added Section 5(6)(c) to authorize Commission approval of consolidations that promote the public interest. 41 Stat. 482. It also added Section 5(8) specifically to exempt participants in Commission-approved consolidations from federal and state legal obstacles. 41 Stat. 482. Section 5(8) expressly stated (41 Stat. 482 (emphasis added)):

> The carriers affected by any order made under the foregoing provisions of this section * * * *shall be, and they are hereby, relieved* from the operation of the "antitrust laws," * * * and of all other restraints or prohibitions by law, State or Federal, *in so far as may be necessary to enable them to do anything authorized or required by any order made under and pursuant to the foregoing provisions of this section.*

This statutory language left no doubt that the ICA's exemption provision attached automatically upon Commission approval and extended as far as necessary to ensure consummation of "anything authorized or required" by the Commission approval order. See

also H.R. Rep. 650, 66th Cong., 2d Sess. 64 (1920) ("An order of the commission approving a specified consolidation may be carried out notwithstanding any State or Federal restraining or prohibitory law to the contrary.").

Section 7 of the Transportation Act of 1940, ch. 722, 54 Stat. 905, amended and recodified Section 5 of the ICA but left the provisions relevant here substantially intact. Former Section 5(6) was subsumed within revised Section 5(2) (see 54 Stat. 905, 908) and former Section 5(8) was subsumed within revised Section 5(11) (see 54 Stat. 908-909). The operative language of revised Section 5(11) remained essentially unchanged, providing (54 Stat. 908-909 (emphasis added)):

> [A]ny carriers * * * participating in a transaction approved or authorized under the provisions of this section *shall be and they are hereby relieved* from the operation of the antitrust laws and of all other restraints, limitations, and prohibitions of law, Federal, State, or municipal, *insofar as may be necessary to enable them to carry into effect the transaction so approved or provided for in accordance with the terms and conditions, if any, imposed by the Commission* * * *.

This language, like that of the 1920 Act, plainly provided that express terms of a Commission-approved transaction were automatically exempted from preexisting legal obstacles. When Congress recodified this language in the present Section 11341(a) of the ICA, it effected no substantive change. Pub. L. No. 95-473, § 3(a), 92 Stat. 1466; *Trailer Marine Transport Corp.* v. *FMC*, 602 F.2d 379, 383 n.18, 384 (D.C. Cir. 1979). See H.R. Rep. 95-1395, *supra*, at 158-160.

Instead, it preserved the original intent, reflected in the 1940 and 1920 Transportation Acts, that approval of a consolidation confers an exemption of sufficient breadth to permit implementation of the terms of the transaction.[18]

B. The Commission's interpretation of Section 11341(a) is consistent with the structure and objectives of the ICA's consolidation provisions

In addition to scrutinizing statutory language, this Court may ascertain congressional intent by "look-[ing] to the provisions of the whole law, and to its object and policy." *Philbrook* v. *Glodgett*, 421 U.S. 707, 713 (1975) (citation omitted). The overall structure of the ICA consolidation provisions and the purpose of Section 11341(a), as demonstrated by the legislative history, reflect two basic objectives: to

---

[18] Furthermore, nothing in the plain language or legislative history suggests that laws governing labor relations are to be treated differently than other laws. Congress understood that rail consolidations and related transactions affect labor interests. It therefore instructed the Commission to consider "the interests of carrier employees affected by the proposed transaction" (49 U.S.C. 11344(b)(1)(D)) and mandated labor protective provisions to provide compensation for displaced workers (49 U.S.C. (Supp. II) 11347). But these provisions were included precisely because of the inevitable adjustments in labor conditions that accompany rail consolidations and related transactions. Indeed, the courts have long recognized the need for the Commission, as well as similar agencies, to prescribe the methods for resolving labor issues that might otherwise frustrate transactions that serve the public interest. See, *e.g.*, *Brotherhood of Locomotive Engineers* v. *Chicago & N. W. Ry.*, 314 F.2d 424 (8th Cir.), cert. denied, 375 U.S. 819 (1963); *Kent* v. *CAB*, 204 F.2d 263 (2d Cir.), cert. denied, 346 U.S. 826 (1953). See discussion at pages 37-40, *infra*.

leave the design of transactions to the carriers themselves, and to replace diverse regulation with a single public interest proceeding.

Following World War I, Congress identified rail consolidation as an important national goal. "The new policy was embodied in the Transportation Act of 1920, the provisions of which encouraged mergers and consolidations of railroad companies, under the supervision of the Interstate Commerce Commission, in the hope of bringing about a stronger national railroad economy." S. Rep. 1182, 76th Cong., 3d Sess. Pt. 1, at 1 (1940). See, *e.g.*, *Schwabacher* v. *United States*, 334 U.S. 182, 191 (1948). Senate sponsors of the 1920 legislation initially considered giving the Commission power to compel railroad mergers. See *St. Joe Paper Co.* v. *Atlantic Coast Line R.R.*, 347 U.S. at 315-316. However, Congress eventually agreed to withhold that power and, instead, created a scheme whereby the Commission would develop a national plan of consolidation in which railroads would participate voluntarily. See *ibid.*[19] That approach, however, ultimately proved unsuccessful, and it was judged better to leave the initiative to the railroads themselves. See *id.* at 316-319.

Congress therefore took further steps, through the Transportation Act of 1940, "to facilitate merger and consolidation in the national transportation system" (*County of Marin* v. *United States*, 356 U.S. 412, 416

---

[19] "Although the Commission could promulgate a plan, it was given no affirmative power to put the plan into effect. It was entitled merely to insist that any consolidations submitted to it for approval should conform to the plan. Thus, the whole problem of initiating and developing actual consolidations was left in the hands of the carriers themselves." S. Rep. 1182, 76th Cong., 3d Sess. Pt. 2, at 524 (1940).

(1958) (footnote omitted)). That legislation eliminated the Commission's obligation to promulgate a national consolidation plan, leaving "the power to initiate mergers and consolidations * * * completely in the hands of the carriers." *St. Joe Paper Co.*, 347 U.S. at 319 (footnote omitted). The 1940 Act thus "relieved the Commission of its responsibility to initiate unifications." *County of Marin*, 356 U.S. at 417. " 'Instead, it authorized approval by the Commission of carrier-initiated, voluntary plans of *merger* or *consolidation* if, subject to such terms, conditions and modifications as the Commission might prescribe, the proposed transactions met with certain tests of public interest, justice, and reasonableness * * *.' " *Ibid.* (emphasis in original, quoting *Schwabacher* v. *United States*, 334 U.S. at 193). As this history shows, the statutory scheme plainly contemplates that the carriers themselves have primary responsibility for structuring the proposed transaction. "[A]lthough the Commission in fulfilling its statutory responsibilities is to carefully review all of the terms of a merger proposal and determine whether they are just and reasonable, it is not for the agency, much less the courts, to dictate the terms of the merger agreement once this standard has been met." *United States* v. *ICC*, 396 U.S. 491, 520 (1970).

This clear understanding that it is for the carriers, not the Commission, to formulate and propose transactions has an obvious corollary that is directly in point here: The Commission may approve, disapprove, or condition a transaction, but once it has approved a transaction it is not open to the Commission to make judgments about which terms were sufficiently "necessary" to override other laws. As this Court explained in *Schwabacher* (334 U.S. at 194 (emphasis added)):

> [A]pproval of a voluntary railroad merger which is within the scope of the Act is dependent upon three, and upon only three, considerations: First, a finding that it "will be consistent with the public interest." (§ 5(2)(b).) Second, a finding that, subject to any modification made by the Commission, it is "just and reasonable." (§ 5(2)(b).) Third, assent of a "majority * * * of the holders of the shares entitled to vote." (§ 5(11).) *When these conditions have been complied with, the Commission-approved transaction goes into effect without need for invoking any approval under state authority, and the parties are relieved of "restraints, limitations, and prohibitions of law, Federal, State, or municipal, insofar as may be necessary to enable them to carry into effect the transaction so approved * * *."* (§ 5(11).)

As this Court recognized, Section 5 consciously limited the Commission's approval power to authorization of carrier-proposed transactions that met a congressionally prescribed test. But once the Commission had determined that the proposed transaction (together with any Commission-imposed conditions) satisfied that test, the ICA itself dictated the consequences.

The present provisions of the ICA state the test without substantive change, requiring a finding that the proposed transaction (as conditioned by the Commission) "is consistent with the public interest." 49 U.S.C. 11344(c). They preserve the basic statutory structure, limiting the Commission's role to approving, disapproving, or conditioning carrier-initiated proposals. And once the Commission determines, after a full hearing and careful examination of the record, that the proposal is consistent with the public interest, the Section 11341(a) exemption permits the carriers

to implement the transaction, without fear that subsequent legal challenges will block or delay execution of one part or another of a fully reviewed and approved plan.

The court of appeals' decision represents a marked departure from this statutory scheme. According to the court, the Commission's approval, based on a finding that a transaction as a whole is in the public interest, is insufficient to exempt the transaction participants from other laws that pose obstacles to implementation of the transaction. Instead, the Commission must examine each transaction term that faces a legal obstacle and determine whether exemption is "necessary to effectuate the transaction" (Pet. App. 16a n.4) and "either in the approval or in a later proceeding, must reveal evidence supporting [each such] conclusion" (*ibid.*). This approach would undermine the statutory scheme in two important respects. First, it would make the design of each transaction a function of a series of term-by-term determinations of "necessity" by the Commission, rather than a result of carrier business judgments followed by a public interest determination in which the Commission is allowed to approve, disapprove, or impose conditions on a transaction, but is not authorized to redesign it. Second, the court of appeals' decision would defeat the congressional goal of replacing a myriad of federal, state, and local legal requirements—whose effect on a transaction may not even be foreseeable when the transaction is consummated—with a single approval process in which a detailed public interest standard is applied by an expert agency that can view the transaction as a whole.

The ICA's approval process provides interested parties—including labor unions—extensive opportuni-

ties to participate in the Commission's consolidation review proceedings and to voice their objections during the "public interest" inquiry. In particular, they may object to approval of a transaction, or particular terms thereof, on the ground that it will undermine the policies expressed in other federal statutes. The Commission must take these objections into account, together with all other comments and objections, in determining whether the merger is "consistent with the public interest" (49 U.S.C. 11344(c)). See, *e.g.*, *McLean Trucking Co.* v. *United States*, 321 U.S. 67, 79-80 (1944) (antitrust objections to motor carrier consolidation).[20] The Commission's public interest

---

[20] The Commission need not, of course, give those objections controlling weight. For example, this Court has long held that the Commission must consider antitrust objections in evaluating a proposed merger, but has further noted:

> Even though such acquisitions might otherwise violate the antitrust laws, Congress has authorized the Commission to approve them if it finds they are in the public interest, "because it recognized that in some circumstances they were appropriate for effectuation of the national transportation policy. * * *."

Minneapolis & St. L. Ry. v. *United States*, 361 U.S. 173, 187 (1959). See also, *e.g.*, *United States* v. *ICC*, 396 U.S. 491, 513 (1970); *Denver & R. G. W. R.R.* v. *United States*, 387 U.S. 485, 492-493 (1967); *id.* at 515 (Harlan, J., dissenting) ("the ICC must take account of antitrust policy in judging the control questions under [former Section 5 of the ICA], but this interest is simply one of the relevant criteria, and if on balance the Commission finds a proposed undertaking to be in the public interest the statute authorizes a grant of antitrust immunity to the transaction"); *Seaboard Air Line R.R.* v. *United States*, 382 U.S. 154, 156-157 (1965); *McLean Trucking Co.*, 321 U.S. at 83 ("the policies of the anti-trust laws determine 'the public interest' in railroad regulation only in a qualified way").

determination is then subject to judicial review. But once the consolidation has been approved as consistent with the public interest, Section 11341(a)'s exemption automatically takes effect. See, *e.g.*, *Minneapolis & St. L. Ry.* v. *United States*, 361 U.S. 173, 186 (1959) (former Section 5(11) "relieves the acquiring carrier, upon approval by the Commission of the acquisition, 'from the operation of the antitrust laws * * *' ").[21]

The Section 11341(a) exemption is, of course, limited; it exempts a participant only "as necessary to let that person carry out the transaction." 49 U.S.C. 11341(a). But that language clearly grants

---

[21] The Commission's responsibilities are largely the same when labor, rather than antitrust issues are involved. Just as the Commission must examine the transaction's "effect on competition among rail carriers" (49 U.S.C. 11344(b)(1)(E)), it must also consider "the interest of carrier employees affected by the proposed transaction" (49 U.S.C. 11344(b)(1)(D)). Like the antitrust inquiry, the labor inquiry reflects only one aspect of the public interest analysis. If the Commission approves the transaction based on its determination, after balancing of all the relevant factors, that the transaction serves the public interest, Section 11341(a) exempts participants from the otherwise applicable labor law. Indeed, labor interests receive additional protection in the form of statutorily mandated labor protective conditions. See 49 U.S.C. (Supp. II) 11347. These special provisions state that if the Commission's approval results in displacement of carrier employees, those employees will receive special compensation. See, *e.g.*, *Norfolk & W. Ry.* v *Nemitz*, 404 U.S. 37, 42 (1971) (the labor protective provisions are intended "not to freeze jobs but to provide compensatory conditions"). The provisions ensure that inability of the parties to agree upon changes in working conditions necessary to Commission-approved transactions will not prevent the approved transaction from being implemented. See *Missouri Pacific R.R.* v. *United Transportation Union* (85-792 Pet. Add. 28a).

an automatic exemption from any federal, state, or local law that would otherwise prevent a party from carrying out a term of an approved transaction.[22] It does not authorize the Commission to determine the intrinsic "necessity" of proposed transaction terms, much less to revisit an approved transaction to determine whether terms of a transaction approved as in the public interest are, on second thought, dispensable. The statutory scheme contemplates that objections to transaction terms must be made in the Commission's initial approval proceeding, where they are considered in connection with the overall determination of the public interest. Reliance on post-approval "necessity" proceedings would frustrate the basic purpose of encouraging "carrier-initiated, voluntary plans" (*Schwabacher*, 334 U.S. at 193) and determining in a single proceeding whether such plans, as conditioned by the Commission, are consistent with the public interest.[23]

---

[22] That point, clearly expressed in the present language, was made especially plain in the previous codifications of the exemption. See 49 U.S.C. (1940 ed.) 5(11) (exemption extends "insofar as may be necessary to enable [participants] to carry into effect the transaction so approved or provided for in accordance with the terms and conditions, if any, imposed by the Commission"). 49 U.S.C. (1925-1926 ed.) 5(8) (exemption extends "in so far as may be necessary to enable [participants] to do anything authorized or required" by the approved transaction). As previously discussed, the present language makes no substantive change from the previous codifications (see page 27, *supra*).

[23] The Commission does, of course, have authority to entertain a post-approval petition for clarification of particular provisions of a Commission decision. See 49 C.F.R. 1117.1 (providing that the Commission may consider petitions for relief not otherwise covered by the Commission's rules).

C. The Commission's interpretation of Section 11341(a) is consistent with six decades of agency and court interpretation of the statute

The Commission first faced the issue presented here in 1923, only three years after enactment of the Transportation Act of 1920. The United States had secured an injunction under the Sherman Act ordering the Southern Pacific Company to divest itself of control over the Central Pacific Railway. *United States* v. *Southern Pacific Co.*, 259 U.S. 214 (1922). The Southern Pacific Company promptly sought Commission approval under former Section 5 of the ICA to maintain control of Central Pacific. The Commission approved the combination as consistent with the public interest notwithstanding the Sherman Act injunction. *Control of Central Pacific by Southern Pacific*, 76 I.C.C. 508, 515-517 (1923). The Commission further stated (*id.* at 517):

But the Commission's role is limited, in that instance, to clarifying the scope and terms of its prior orders. The Commission's authority to modify its prior orders approving consolidations and related transactions is limited by 49 U.S.C. 11351, which provides that the Commission may supplement its orders "[w]hen good cause exists." Good cause " 'requires some event or change in circumstances which *necessitates* a supplementation or modification * * *.' " *Illinois* v. *ICC*, 713 F.2d 305, 310 (7th Cir. 1983) (emphasis in original; quoting *Greyhound Corp.* v. *ICC*, 668 F.2d 1354, 1362 (D.C. Cir. 1981)). The Commission may also retain jurisdiction to ensure that terms and conditions of approved transactions are being followed. See, *e.g.*, *Penn-Central Merger Cases* 389 U.S. 486, 521-522 (1968). But none of these sources of post-approval review contemplate the reopening of administratively final actions for reconsideration of issues that could have been raised during the Commission's original review. See 49 U.S.C. 10327(i); 49 C.F.R. 1115.4.

> [I]t seems to us that the provisions of [former Section 5(8)] were intended by Congress to remove all active restraints by law and grant authority so far as necessary to enable the carriers affected by our order to do anything authorized or required thereby.

Thus, the Commission concluded, over 60 years ago, that once it approved a consolidation pursuant to the ICA's public interest standards, the ICA's exemption provisions automatically exempted "anything authorized or required thereby" from other legal restraints. The Commission has consistently followed that practice, stating that the exemption provisions are "self-executing" and that, accordingly, there is no need for the Commission to declare that a carrier is relieved from particular restraints. *E.g., Railway Express Agency, Inc., Notes*, 348 I.C.C. 157, 215 (1975); *Revised Regulations Governing Interlocking Officers*, 336 I.C.C. 679, 681-682 (1970); *Texas Turnpike Authority Abandonment By St. Louis Southwestern Ry.*, 328 I.C.C. 42, 46 (1965); *Chicago, St. P., M. & O. Ry. Lease*, 295 I.C.C. 696, 702 (1958).

Notably, the Commission has routinely approved—and the courts of appeals have affirmed—consolidations and operating agreements specifying labor rearrangements that, absent Commission approval and the consequent ICA exemption, could precipitate invocation of the RLA.[24] In the leading case, *Brother-*

---

[24] The Commission most recently addressed this issue in *Maine Central R.R., Georgia Pacific Corp., Canadian Pacific Ltd. & Springfield Terminal Ry.—Exemption from 49 U.S.C. 11342 and 11343*, Finance Docket No. 30532 (I.C.C. Aug. 22, 1985), appeal pending, No. 85-1636 (D.C. Cir.). See 85-792 Pet. Add. 40a-51a. In that decision, the Commission noted the practical importance of resolving labor disputes through the

hood of Locomotive Engineers v. *Chicago & N. W. Ry.*, 314 F.2d 24 (8th Cir.), cert. denied, 375 U.S. 819 (1963), the Commission approved a rail carrier's acquisition of another railroad pursuant to former Section 5(2) of the ICA, subject to a stipulation by the railroads and the affected unions providing labor protective provisions. The stipulation specifically provided that disputes would be resolved through binding arbitration. 314 F.2d at 427. When disputes later arose, the unions refused to go to arbitration, claiming instead that, despite the stipulation, they were entitled to invoke their RLA rights. The court of appeals rejected the union's arguments.

The court recognized that "[the Commission's] power to authorize mergers would be completely ineffective if authority to adjust work realignments through fair compensation did not exist." 314 F.2d at 430. It concluded that "Congress intended the [Commission] to have jurisdiction to prescribe the method for determining the solution of labor problems arising directly out of approved mergers" (*id.* at 431). The court stated (*id.* at 431-432):

Commission's labor protective provisions rather than the RLA procedures, stating (85-792 Pet. Add. 50a):

> All of our labor protective conditions provide for compulsory binding arbitration to arrive at implementing agreements if the parties are unable to do so, so that approved transactions can ultimately be consummated. Under RLA, however, changes in working conditions are generally classified as major disputes with the results that there is no requirement of binding arbitration. * * *. Since there is no mechanism for insuring that the parties will arrive at agreement, there can be no assurance that the approved transaction will ever be effected.

> Thus, like the trial court, we come to the conclusion that to hold otherwise would be to disregard the plain language of [former Section 5(11)] conferring exclusive and plenary jurisdiction upon the [Commission] to approve mergers and relieving the carrier from all other restraints of federal law.

The court specifically rejected the union's argument that the Commission must make express findings relieving the carriers from their RLA obligations (314 F.2d at 432). The court quoted with approval from the Commission opinion in *Chicago, St. P., M. & O. Ry. Lease*, 295 I.C.C. 696, 702 (1958), stating (314 F.2d at 432):

> The terms of [the ICA exemption provisions] are self-executing, and there is no need for this Commission expressly to order or declare that a carrier be relieved from certain restraints. It is sufficient if we make clear what the carrier is authorized to do.

Other decisions have reached similar results, agreeing that the Commission may approve rail consolidations that specify particular labor arrangements and, as a consequence, curtail RLA rights. See, *e.g.*, *Missouri Pacific R.R.* v. *United Transportation Union*, 782 F.2d 107 (8th Cir. 1986), petition for cert. pending, No. 85-1054; *Nemitz* v. *Norfolk & W. Ry.*, 436 F.2d 841, 845 (6th Cir.), aff'd on other grounds, 404 U.S. 37 (1971). Furthermore, that authority is implicit in decisions of this Court and the courts of appeals recognizing the Commission's authority to impose labor protective conditions. See, *e.g.*, *Norfolk & W. Ry.* v. *Nemitz*, 404 U.S. 37 (1971); *Brotherhood of Maintenance of Way Employees* v. *United States*, 366

U.S. 169 (1961); *Railway Labor Executives' Ass'n* v. *United States*, 339 U.S. 142 (1950); *Railway Labor Executives' Ass'n* v. *ICC*, 675 F.2d 1248 (D.C. Cir. 1982); *New York Dock Ry.* v. *United States*, 609 F.2d 83 (2d Cir. 1979).[25] The cases relied upon by the court of appeals, by contrast, are largely inap-

---

[25] This Court has noted, in particular, that the purpose of the ICA's labor protective provisions requirement "was not to freeze jobs but to provide compensatory conditions." *Norfolk & W. Ry.*, 404 U.S. at 42; accord, *Brotherhood of Maintenance of Way Employees* v. *United States*, 366 U.S. at 175-176. That purpose is made clear by the legislative history of the labor protective provisions and, in particular, by Congress's rejection of the "Harrington Amendment" to the Transportation Act of 1940, which would have imposed a job freeze upon merging railroads. See *Brotherhood of Maintenance of Way Employees*, 366 U.S. at 173-176. As the Eighth Circuit explained, the rejection of the Harrington Amendment also indicates that Congress empowered the Commission to prescribe alternatives to the RLA for determining the solution of labor disputes arising out of approved transactions. *Chicago & N. W. Ry.*, 314 F.2d at 430-431.

Indeed, the Commission would presumably have authority to approve consolidation plans that override RLA rights even in the absence of Section 11341(a)'s express exemption. For example, the courts long recognized the Civil Aeronautics Board's authority to adjust the seniority rights of employees affected by the merger of two airlines even in the absence of explicit statutory authority to do so. See, *e.g.*, *Kent* v. *CAB*, 204 F.2d 263, 265-266 (2d Cir.), cert. denied, 346 U.S. 826 (1953). Thus, even a " 'private contract must yield to the paramount power of the Board to perform its duties under the statute creating it to approve mergers * * * only upon such terms as it determines to be just and reasonable in the public interest.' " *American Airlines, Inc.* v. *CAB*, 445 F.2d 891, 896 (2d Cir. 1971), cert. denied, 404 U.S. 1015 (1972) (quoting *Kent*, 204 F.2d at 266).

posite, as discussed by Judge MacKinnon at some length in his dissent (Pet. App. 33a-38a).[26]

In sum, the court below has failed to give proper deference to an expert agency's longstanding inter-

---

[26] In particular, the court mistakenly cited *City of Palestine* v. *United States*, 559 F.2d 408 (5th Cir. 1977), cert. denied, 435 U.S. 950 (1978), and *Texas & N. O. R.R.* v. *Brotherhood of Railroad Trainmen*, 307 F.2d 151 (5th Cir. 1962), cert. denied, 371 U.S. 952 (1963), for the proposition that the Commission must explain the necessity for a Section 11341(a) exemption (Pet. App. 17a-18a). *City of Palestine* held, upon direct review of a Commission consolidation approval decision, that the Commission exceeded the scope of its approval authority by voiding a contract that was "not germane" to the transaction. 559 F.2d at 414. Here, by contrast, there is no dispute that the Commission properly granted MKT and DRGW trackage rights to ameliorate certain anticompetitive effects of the UP-MP consolidation. See *UP-Control-MP*, 366 I.C.C. at 566-579. There can be no serious dispute that the tenant railroads' reservations of the right to use their own crews are "material terms" (Pet. App. 67a) of those trackage rights. As Judge MacKinnon explained, "the Commission's goal of preservation of competition through the grant of trackage rights might well be frustrated by the prospect of requiring the railroads granted those rights to negotiate with the union representing the employees of [their] *competitors*" (*id.* at 39a (emphasis in original)). *Texas & N. O. R.R.* held that the ICA's exemption provision does not confer jurisdiction on the courts, otherwise withdrawn by the Norris-LaGuardia Act, to enjoin labor disputes. 307 F.2d at 156. The court specifically noted that "[i]f it should be determined that the Commission's authority under [former] section 5 is being frustrated by application of [the] Norris-LaGuardia [Act] to the present suit, we would have to conclude that Norris-LaGuardia was preempted by [former] section 5(11), even though [former] section 5 is not labor legislation." 307 F.2d at 158. To the extent that *City of Palestine* and *Texas & N. O. R.R.* contain dicta contrary to the Commission's interpretation of the ICA's exemption provision, we consider those dicta incorrect.

pretation of the statute that it is entrusted to administer. See, *e.g.*, *United States* v. *Riverside Bayview Homes, Inc.*, No. 84-701 (Dec. 4, 1985), slip op. 9; *Chevron U.S.A. Inc.*, 467 U.S. at 842-843. The court's departure from established principles of judicial deference is particularly inappropriate here, where the Commission's interpretation has received both explicit and implicit judicial approval.

D. The court of appeals' construction would seriously impede the implementation of Commission-approved transactions

The court of appeals' decision not only runs counter to the language, structure, and longstanding interpretation of the statute; it also would pose serious practical obstacles to Commission review of proposed consolidations and trackage rights transactions. The court states that the Commission "either in the approval or in a later proceeding, must reveal evidence supporting a conclusion that waiver of a particular legal obstacle is necessary to effectuate the transaction" (Pet. App. 16a n.4). But the Commission plainly cannot anticipate and reconcile all potential legal obstacles during the approval process.[27] The Commission must rely on interested parties to bring their specific concerns to its attention. And the court's suggestion that the Commission later reevaluate approved transactions to determine whether a Section 11341(a) exemption is truly necessary will result in post-approval confusion, litigation, and consequent delays. Carriers that have received approval of their

[27] Indeed, the court of appeals itself recognized (Pet. App. 16a n.4) that requiring the Commission to enumerate every legal obstacle would undermine the ICA's purpose of facilitating rail consolidations.

consolidation plans will face continuing legal challenges, thwarting implementation of transactions that have been reviewed and found consistent with the public interest.

The court of appeals' approach would also introduce an element of gamesmanship to the approval process. Under the Commission's interpretation, proponents of a transaction have a strong incentive to explain fully the terms of their proposal because the scope of their Section 11341(a) exemption extends only so far as the terms they specify. See *Chicago, St. P., M. & O. Ry. Lease*, 295 I.C.C. 696 (1958). And persons who believe that the transaction will interfere with their existing rights have a strong incentive to present timely "public interest" objections for the Commission's review. The court of appeals' decision provides, however, that an exemption may be denied if approved terms of the transaction are later determined not to be "necessary" to the transaction. The court's decision may therefore encourage parties who oppose a particular transaction to reserve their objections, based on strategic considerations, for post-approval challenge. The Commission, in turn, would be denied full input from the parties at the crucial transaction approval stage of its proceedings.

These problems are well illustrated in the present case. The Commission conducted an extensive review of Union Pacific Corporation's UP-MP-WP consolidation proposal, which involved over 22,000 miles of railroad tracks located in the western and midwestern states. Numerous parties participated, including 10 Class I railroads, 12 labor organizations, various federal and state governmental agencies and interested corporations and individuals. See *UP-Control-MP*, 366 I.C.C. at 474-482. The Commission held

hearings spanning 11 months and received testimony from over 300 witnesses. It compiled an administrative record that included over 600 hearing exhibits and over 18,000 pages of transcript. The Commission then issued a comprehensive 196-page opinion, accompanied by 12 appendices, approving the consolidation subject to various conditions, and its decision was affirmed in all relevant respects by the court of appeals.

In the course of these proceedings, MKT and DRGW filed trackage rights applications placing all participants, including BLE and UTU, on notice of their intention to conduct operations using their own crews. As previously noted, both MKT and DRGW specified within their trackage rights applications that they would retain the right to use their own crews (see note 5, *supra*). They both made clear, in subsequent written statements supporting their trackage rights and in hearing testimony, that they would crew their own trains (Pet. App. 62a-63a). And their projections of labor impacts were based on assumptions that they would use their own crews (*ibid.*).

Neither BLE nor UTU objected to MKT's and DRGW's crewing provisions at any point in the Commission proceeding (Pet. App. 62a-64a). Nor did they suggest that they have the established rights to participate in crewing decisions that they now claim. Indeed, the BLE's witness, Mr. Becker, indicated that, if the trackage rights were granted, BLE employees would be adversely affected (Pet. App. 64a-65a). And the UTU, in its post-hearing brief, relied on labor impact evidence that assumed trackage rights operations would be conducted by the tenant railroads' crews (Pet. App. 65a). Neither

BLE nor UTU objected to the crewing provisions in the subsequent judicial review of the Commission's decision. The unions did not present their objection to the crewing terms until April 4, 1983, over five months after the Commission had approved the transaction (see Pet. App. 51a).

The mechanism contemplated by Congress will only work if carriers fully describe their proposed transactions and opposing parties fully present their objections in the statutory public approval proceedings. MKT and DRGW fulfilled their obligations by seeking Commission approval of their proposed transaction terms. BLE and UTU could have objected to the MKT/DRGW crewing provisions in the original Commission proceeding. The Commission would have resolved the union claims under its "public interest" standard, taking into account "the interest of carrier employees affected by the proposed transaction." 49 U.S.C. 11344(b)(1)(D). In the absence of any objection,[28] the Commission was fully justified in approving the proposed terms. Yet under the court of appeals' decision, the unions would be permitted to raise their claims months later in a post-approval proceeding, in which the Commission would be required to evaluate the objection under a different standard: whether "termination of the asserted rights to participate in crew selection is necessary to

---

[28] Contrary to the court of appeals' suggestion (Pet. App. 16a), the Commission cannot be expected to anticipate objections that the affected parties themselves fail to raise. Indeed, the union's post-approval objections in this case were unforeseeable. Judge MacKinnon's comment was that the unions' purported rights are based on the "astonishing contention" that "the unions, in effect, have a proprietary interest in the tracks of their employer" (*id.* at 29a).

effectuate the pro-competitive purpose of the grant of trackage rights" (Pet. App. 45a).

The unions' post-approval legal challenges have already created substantial and lingering uncertainty concerning the terms of UP-MP-WP consolidation, a merger initiated nearly six years ago. If the Commission is required to reevaluate the "necessity" of approved transaction terms, subject, inevitably, to further judicial review, additional delays and uncertainty will result.[29] Plainly, the court of appeals' decision opens the door to litigation that will ultimately discourage rail consolidation, impede effectuation of our Nation's rail transportation policy, and prevent the issuance of "fair and expeditious regulatory decisions when regulation is required." 49 U.S.C. 10101a(2).

---

[29] Furthermore, if the parties are ultimately required to resort to the RLA to effect changes in working conditions, either labor or management could delay indefinitely or thwart entirely the implementation of a Commission-approved transaction by refusing to agree to changes in working conditions. As we have previously noted, the Commission's plenary power to approve transactions that will result in labor rearrangements is implicitly recognized in *Norfolk & W. Ry.* v. *Nemitz*, 404 U.S. at 42-43, and is expressly articulated in *Chicago & N. W. Ry.*, 314 F.2d at 430, and *Missouri Pacific R.R.* (85-792 Pet. Add. 28a). See pages 37-40, *supra*. Indeed, the courts have concluded that regulatory agencies have the authority to resolve labor problems as necessary to ensure that approved transactions can be implemented even in the absence of an explicit statutory provision such as Section 11341(a). See note 25, *supra*.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

CHARLES FRIED
Solicitor General

LOUIS R. COHEN
Deputy Solicitor General

JEFFREY P. MINEAR
Assistant to the Solicitor General

ROBERT S. BURK
General Counsel

HENRI F. RUSH
Deputy General Counsel

SIDNEY L. STRICKLAND, JR.
Attorney
Interstate Commerce Commission

JUNE 1986

☆ U. S. GOVERNMENT PRINTING OFFICE: 1986 491507 20248